

No. 2924.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

ISABELLE GARWOOD,
Plaintiff in Error,

v.

JOSEPH SCHEIBER and MORRIS
SCHEIBER and JOHN SCHEIBER,
Defendants in Error.

PETITION FOR REHEARING

LLOYD MACOMBER,
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FILED

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F. D. MONCKTON,
CLERK.

If A sells to B a tract of land for \$125 per acre, and B gives to A \$75,000 upon the representation of A that there are 600 acres to the tract, and it turns out that there are only 450 acres,—thereafter, in an action brought by B to recover from A the money paid for the 150 acres never received, will the law allow A, as a defense, to put in opinion testimony to the effect that the 450 acres conveyed were worth \$200 an acre instead of \$125?

This Court (for the Fourth Circuit) has said: "The agreement to pay \$60,000 was a single and entire undertaking for the whole property purchased; and appellant should not now be heard to say that, although there may have been fraud as charged by the appellees in the sale of the timber, the entire property was worth more than he sold the same for." *Kell vs. Trenchard*, 142 Fed. 20, 73 C. C. A. 202.

The Supreme Court of Iowa has said: "The twelfth instruction directs the jury that the price agreed upon is to be taken as the value of the 84 acres of land. This is correct. When parties, by solemn agreement, fix a value to property, they are bound by it. The law will not, in a case of this kind, permit either party to dispute the value as settled by them." *Howes vs. Axtell*, 74 Iowa, 400, 37 N. W. 974.

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PETITION FOR REHEARING.

Plaintiff in error respectfully petitions the court for a rehearing in the above entitled cause.

In the judgment of counsel the court has misapprehended the facts in this case. We believe that the facts have been misapprehended in two vital phases, and that from this misconception of the facts there has resulted a misapplication of law. In this case the complaint alleges and the record shows that the vendors agreed to sell to the vendee 600 acres of land, protected from overflow, for \$125 an acre. The vendee paid the vendors \$75,000 with that understanding; but got only 450

NOTE.—Figures in parentheses refer to pages of transcript. All italics are ours.

acres of land. Relief is sought in this case upon the theory laid down in *Smith vs. Bowles*, 132 U. S. 125, 33 L. ed. 279, that is, that the plaintiff's measure of damage is the difference between the value of that which she parted with and the value of that which she received. The complaint is not framed upon any theory of damages for the loss of any bargain; but merely asks for compensation. The first phase in which the facts have been misapprehended is as to the value of the land which the plaintiff received under the contract. The second phase is as to who is responsible for the misapprehension as to the true character and quantity of the land which the plaintiff admittedly had at the time they sold her the land. The misapplication of law complained of is that the opinion sanctions the action of the trial court in disregarding the price per acre fixed by the agreement of the parties, and permitting the defendants to put in opinion testimony to the effect that the 450 acres actually conveyed were worth more than \$125 per acre, and were worth the \$75,000 which the vendee gave them for the represented 600 acres.

PLAINTIFF DID NOT GET FULL VALUE.

The opinion states: "The more reliable testimony substantiates the view that the property at the time of the purchase was reasonably worth all the plaintiff gave for it." * * * "So that there is here, without considering the land beyond the levee, more than full value, according to what Miss Garwood paid for the ranch." From these statements it is plain that

the court has decided the case on the theory that the 450 acres which the plaintiff actually received was worth the \$75,000 which she parted with, regardless of representations or agreements. That the court decided the case upon that theory is plain for the further reason that, aside from the testimony referred to by the language just quoted from the opinion, the record presents no evidence upon which a judgment for the defendants can be based. I believe that the court is of the impression that the plaintiff is trying to retain the land, and also take from the defendants money as damages to which she is not morally entitled. The plaintiff did not get full value for her money. Her injury is more than thirty thousand dollars. And with all the earnestness that I can command I will say that the record in this case shows that if ever a suit was commenced in a court of justice in which the plaintiff was entitled to relief this is one.

To the end of proving the assertion just made, we will respectfully invite the court's attention to the map herein at page 4a. This map is a photograph of defendants' Exhibit J, and it is a very good map of the land involved and the surrounding farms. This map is included in the Transcript, and is also appended to plaintiff's brief. For the convenience of the court, I have marked with arabic numerals in red ink all the tracts in close proximity to the land involved, concerning which there is any definite and positive testimony in the record in respect to sales. At this point we will respectfully call the court's attention to the fact that there was no change in land values

in that neighborhood during the twelve years immediately preceding the sale to the plaintiff. On page 314 the witness Wessing testifies: "From 1899 and 1900 up to 1911 and 1912 the values ran along pretty steady, about the same. There was not much change." To the same effect, see the uncontradicted testimony of three other witnesses at pages 426, 329 and 330 and 335. Tracts 2, 4 and 7 immediately adjoin the land involved, and the remaining tracts, 1, 5 and 7, are all within less than three-quarters of a mile from the land involved. All of the tracts are of the same general character of land. (425, 317, 415, 409, 410, 411.) Tract designated No. 1 is the northerlymost tract on the map, and is marked as belonging to M. Meis *et al.* As appears from the map, this tract is about 180 acres. It was sold at auction "just a year before Miss Garwood bought the Scheiber place," and the "highest bid was \$69 an acre" (315). Tract No. 2 is the farm which adjoins the land involved on the northeast. It is marked Scheiber Bros., but all through the testimony it is referred to as the "Redfield Farm." The Redfield farm was sold by D. R. Redfield to Schwartz, and thereafter Schwartz sold to Scheiber Bros, Redfield having retained for himself the small piece shown at the upper end of the tract. On page 411 D. R. Redfield testifies: "A. I sold 140 acres for \$5000 to Schwartz." By the testimony of Redfield on page 412, and also by the testimony of Wessing on page 319, 20 of the 140 acres are outside the levee, and therefore not to be counted. We see, then, 120 acres sold for \$5000, which is just \$41.66 per acre. On



page 409 Redfield testifies that he sold it "About ten years ago." The date of the trial when he testified was in July, 1915, which would make the date of the sale 1905, about 6 years prior to the sale to the plaintiff. The Redfield Farm is identically the same as the best portion of the land sold to plaintiff. (409, 410, 411, 425.) Tract No. 3 is the land involved herein. It was bought by defendants in 1899 (339) for \$27,000, which is just \$60 per acre for the 450 acres of usable land which there is to the farm. (363.) Tract No. 4 is the land of W. H. Saylor, adjoining the Garwood land on the southwest. By the testimony of the owner Saylor, the tract contains 125 acres and was bought by him in 1909 or 1910 (399), that is, a year or two before the sale to plaintiff. On page 404 Saylor testifies that he paid \$100 an acre for the tract. By the testimony of Mulvany (425) the Saylor place is better land than the Garwood place. By the testimony of Wessing on page 317 the Saylor land and the Garwood land are of the same character. Tract No. 5 is a small piece of about forty acres just south of the Saylor land. It was sold to Borgman in 1905 (323) for \$131 an acre (316). Tract No. 6 is the southerlymost tract on the map, and is a little over a half mile from the southerly corner of the Garwood land. It consists of 850 acres, and was bought by Gillmore in 1911, or 1912, for \$26,000 (316, 317), which is slightly less than \$31 per acre. Tract No. 7 is the tract designated "John Schwall" at the southeasterly corner of the Garwood land. On page 318 the witness Wessing testifies: "There was 180 acres

of land just east of the Garwood place belonging to John Schwall, which was sold to some Japs for \$85 an acre. Then after paying a part of the purchase price, they defaulted on the balance and let the land revert to the sellers." It must be remembered that the neighboring tracts, with but one exception, were all comparatively small, much smaller than the Garwood tract. Large tracts of land, when sold in their entirety, always sell for less per acre than small tracts. One reason for that is the wholesale principle. The main reason is, however, that for large tracts the number of purchasers is much more limited. There are fewer men with money enough to buy the large tracts. The court can draw its own conclusions from the sale figures quoted; but, notwithstanding their overwhelming significance, the defendants' value witnesses (all neighboring farmers and close friends of the defendants) testified that the 450 acres of the Garwood land, lying to the east of the levee was worth \$75,000.

At this point we will ask if it might not be pertinent to suggest that we disregard the opinions of all the value witnesses and take a glance at the agreement of the parties? Would that be a proper and legal way to ascertain the value of the land? Have we any authority to support the suggestion? I will quote from just one single case from among the many cited in the brief of plaintiff under the heading on page 19.

In *Harrell vs. Hill*, the court says:

"In response to this we have to say that we can alone look to the agreement of the parties to determine the value of the premises in question. By their contract, solemnly entered into, they have

computed the tract supposed to contain one hundred and eighty acres at the gross price of one thousand five hundred dollars, or at the average value of eight dollars and thirty-three and one-third cents per acre. The evidence of other persons as to their estimate of the value of the land must be regarded as foreign to the subject and not pertinent to the inquiry, the true rule in analogous cases being that the price paid must be regarded as the only evidence of the value."

Harrell vs. Hill, 19 Ark. 102, 68 Am. Dec. 212-218.

I have worked on the case of *Garwood vs. Scheiber* for more than four years, and on this particular point I have gone through the books as thoroughly as the ingenious devices of modern law book makers will permit, and I can conscientiously say that I do not believe that, aside from the decision of this court in the case at bar, not a case can be found in conflict with the doctrine just quoted. The question which now logically presents itself to us is: "What was the agreement between the parties?" The deed mentions the land as 600 acres more or less (84, 85). In the brief of plaintiff, commencing with the heading on page 77, will be found case after case holding that such language in the written instrument constitutes a sale by the acre. And the court will there also find case after case holding that where the language of the written contract is ambiguous a sale by the acre is to be presumed unless the contrary is clearly established by parol evidence. All the cases are to the effect that the presumptions are against sales in gross. The plaintiff testified (172, 166, 167, 176) that the land was

talked to her and put up to her and sold to her at \$125 per acre. At no place in the record is she contradicted. She is corroborated by all three of the defendants' agents—Crane, Dike and Brown. (See Plaintiff's Brief, p. 38 *et seq.*) On page 254 of the record the agent Dike testifies: "We did effect a sale to Miss Garwood of a ranch belonging to Scheiber Brothers which we represented to contain 600 acres, three hundred of which was in alfalfa and the balance in pasture land." And on page 257 Dike admits that the land was represented as being 600 acres and as being all level. On page 261 Dike testifies that the arrangements were that they were to sell the land for \$125 an acre. On pages 107 and 108 the agent Crane testifies that the land was represented to Miss Garwood as being first-class alfalfa land and that it was put up to her at "\$125 an acre." On pages 98 and 99 the agent Brown testifies that the land was represented to the plaintiff as being 600 acres of the finest alfalfa land, and that it was sold to her at \$125 an acre. And the land was represented to her as being free from overflow. (See pages 13 and 14 of this petition.)

When plaintiff's testimony is uncontradicted, and is corroborated by the uncontradicted testimony of three of the defendants' agents, two of whom are palpably hostile, what more convincing proof could be desired? In order to shorten this petition as much as possible we will eliminate altogether from the discussion the point as to the inferior land at the south end of the tract.

By the undisputed testimony of the engineer Jones

(86) there is just 450 acres of land to the tract inside the levee, that is, to the southeast of the levee. Whatever land there is outside the levee is valueless. The defendants themselves expressly admit that on page 397, and so does their witness Wessing on pages 310 and 311. Complete data as to character of the land lying outside the levee will be found in plaintiff's brief, on page 49 *et seq.* We find, then, that the only thing of value which the plaintiff received under the contract is the 450 acre tract southeast of the levee. By the terms of the agreement between the parties, what is the value of the 450 acre tract of land which she actually received? When we multiply \$125 by 450 we find that it is just \$56,250. In no event can the value of the 450 acres of usable land be considered as exceeding that amount.

PLAINTIFF WAS MISLED BY MISREPRESENTATIONS INTO BELIEVING THAT SHE WAS TO GET 600 ACRES OF PROTECTED LAND.

On page 9 the opinion states that the defendants themselves represented to Miss Garwood "the conditions as they really existed". This is a most serious misapprehension of the facts. Counsel for defendants does not contend that plaintiff knew the actual conditions of the land. His argument is that, from certain things that were said to her, she *ought to have known that there were not 600 acres of land*. When plaintiff bought the land she did so under the belief that she was getting 600 acres of first-class alfalfa land pro-

tected from overflow by levee. By the uncontradicted testimony of four witnesses (see quotations of testimony on page 8 of this petition), the price and value of the land agreed upon was \$125 an acre, and the money she paid was just 600 times \$125. By the undisputed testimony of the engineer Jones (86), there are but 450 acres inside the levee, that is to the eastward of the levee. The plaintiff did not know of this shortage until several months after the sale (186, 187). The question now to be discussed is: "Who is responsible for the misapprehension of the plaintiff as to the character and quantity of the land?" Counsel for the defendants does not deny that she did have this misapprehension. Nowhere does he argue that plaintiff knew of the shortage at the time of the sale. A glance at the first twenty pages of defendants' brief will show his argument to be that the fact that she had this misapprehension is purely her own fault, and no fault of the defendants. The plaintiff's testimony is to the effect that they, the defendants and their agents, led her to believe that the levee was the western boundary of the land. The defendants make the claim that they did not tell her that the levee was the boundary, but that it was the river that they mentioned. At no place in the record is there any evidence that they made any statement to plaintiff in respect to the quantity of the land outside the levee; and there is no evidence that they told her anything about how far the river was from the levee. They admit that they never said anything to plaintiff in that respect. On page 394 Joseph Scheiber testifies:

"Q. You know there used to be more land to that ranch than there was when you sold it?

"A. Yes.

"Q. That is true?

"A. That is true.

"Q. Do you know whether or not this woman knew about that land being gone when she bought the place?

"A. I don't know whether she knew that, or not.

"Q. You did not point out to her across the river where there was any land?

"A. I pointed the lines.

"Q. She never went upon the levee?

"A. Not that I seen.

"Q. You were out driving with her, were you?

"A. Yes.

"Q. You never drove her over the levee, did you?

"A. No. I did not drive over the levee.

"Q. Why didn't you drive her over the levee?

"A. You could not drive over there, too rough, too steep.

"Q. Wasn't there a road up on the levee there?

"A. We used to have a road there; we had been hauling wood out, but that was not a road to go on with a lady like Miss Garwood with a buggy."

Then on page 395 Joseph Scheiber testifies:

"Q. Why didn't you show her how the land was just outside the old levee, Mr. Scheiber?

"A. She never asked me to go over there.

"Q. She never asked you, so you didn't take her?

"A. I never thought of it; she did not ask me to go.

"Q. You did not tell her how much land there was over the levee?

"A. No.

"Q. You didn't say how much?

"A. No."

On pages 364 and 365 Morris Scheiber testifies:

"I told her that the land goes clear out to the river, over across the levee out to the old river there, and I pointed it out to her.

"Q. Did you tell her how much land there was out there?

"A. No.

"Q. Did she ask you?

"A. No."

Now on page 359 defendant Morris Scheiber testifies:

"Q. Did you tell her any land went across the river?

"A. No, not across the river, I says, 'Over to the old Feather River.'

"Q. Do you know whether she understood at the time or not that the river was up against the levee or whether it was away back from the levee?

"A. I don't know.

"Q. You don't know?

"A. No; she did not say anything."

The point that counsel makes (see first twenty pages of his brief) is that there telling her that the land went to the river was sufficient, and that it was for the plaintiff herself to know just how far the river was from the levee, and that if she formed a wrong conclusion in that regard it was her own lookout, and no fault of the defendants. Counsel says on page 11 of his brief: "It may be that plaintiff thought the river was closer than it was, and that she did reach

a wrong conclusion." From the testimony of Dike at the top of page 261, where he says: "We pointed the boundary by levee and river boundary," it is plain that they did give her the levee as the western boundary. But for the purpose of this argument we will concede that the defendants did use the word river instead of the word levee. The point I make is that after assuring her that there were 600 acres, and taking her money on that basis, they can not now be heard to say that she should have known that twenty-five per cent of the tract was outside the levee and useless for any agricultural purpose. Even had they said "to the river," they would not have been telling the truth; because some of the land was beneath the river, and some at least on the far side.

We will respectfully call the court's attention to the fact that just prior to her visit to the land the defendants' agents gave plaintiff a circular containing representations concerning the tract. Speaking of this circular or book, the plaintiff, on page 191, testifies: "I believed implicitly every word that they said and what they said was exactly what they showed me in their book, and I believed everything otherwise I would not have bought the place." By the case of *Connecticut Mutual Life Ins. Co. vs. Carson*, 186 Mo. 221, 172 S. W. 69, quoted from at length in plaintiff's brief at page 159 *et seq.*, the circular which they gave the plaintiff is competent, relevant and material evidence. A photograph of the page of the circular with the item describing this land can be seen at page 433 of the transcript. The remarks in the circular con-

cerning this land are as follows: "600 acres in Sutter County. River Bottom land, east bank of the Feather River, near Nicholas. Is protected from overflow by levee. Under cultivation, mostly alfalfa, there being 300 acres in alfalfa, balance adapted to growth of alfalfa," etc., etc. "The soil is deep, rich sediment loam, and lays practically level. No irrigation is required for alfalfa." We ask the court to particularly note the sentence "*Is protected from overflow by levee.*" From this it is clear that the 600 acres they were to sell her would be found on the east side of the levee. It was represented to her that the land was protected from overflow, and assuredly any territory outside the levee would not be "protected from overflow." The land she was interested in was that which lay eastward from the levee and which lay "practically level." Assuredly any land that might lay between the levee and the actual edge of the water could not be level. We respectfully invite the court's attention to the testimony of the plaintiff commencing at the foot of page 171 of the record, where she says (speaking of Mr. Dike):

"A. He said, 'The Natomas land overflows, and the Natomas people would not sell their land under \$250.00 an acre, they have got to stop that overflow, too,' and he said, 'you will get your land for \$125 an acre and it is already stopped.'"

Nowhere is that testimony contradicted. We desire to ask this question: "In view of the representations which were made, can counsel's contention be legally, equitably, or morally just?" From the evi-

dence we see that the circular and the verbal representations of the three agents of the defendants assured plaintiff that she was to have 600 acres of land which lay practically level and was protected from overflow by levee. There is absolutely nothing in the record to show that the plaintiff had any warning whatever that any portion of the 600 acres of finest quality of alfalfa land lay on the outside of that levee. The defendants claim that some remarks were made in respect to what the land outside the levee was good for. They claim that the plaintiff asked them what that land outside the levee was good for, and they told her that it was "good for wood." Now the 600 acres that she was paying \$125 an acre for was all good for alfalfa—the finest alfalfa land. If the land outside the levee was good only for wood how could any of those 600 hundred acres be out there. Under the conditions which appear so plain, how can the plaintiff be accused of having received notice or warning sufficient to put her upon notice that there was not fully 600 acres of good land. Assume that they told her that there was some land on the outside of the levee lying between the levee and the river; for that circumstance to be of any benefit to them as a defense they must have accompanied it with a full explanation that that land which lay outside the levee was a part of the 600 acres which she had been told about. After being assured that there were 600 acres of alfalfa land "protected from overflow by levee," and laying "practically level," if she were told that there was some land lying between the levee and the

river wouldn't she suppose, and wouldn't she have a right to suppose, that it was abandoned swamp land (which it actually is)? Wouldn't anyone (much less a woman with absolutely no experience in those matters) naturally under those conditions give that land but a momentary place in his attention? We would think of it as abandoned land, state or government land, or no man's land. And even if she were expressly told that it belonged to the ranch, if she had been assured that there were 600 acres of first-class alfalfa land, protected by the levee, and had believed what had been told her, would she not think of that land outside the levee as being additional to the 600 acres of protected land lying to the eastward of the levee? Having believed and relied upon the representations as to the quantity and quality would not such a conclusion be natural and proper? And just now we must remember that on the outside bank of the levee lays a dense growth of rather tall trees, the tops of which form a dense wall of green which projects above the levee. Even if you stand on the levee, you have no way of telling whether the river is a hundred feet away from you or a mile away. Two or three acres lying outside the levee with that growth or vegetation on it would be amply sufficient to make the same appearance from the road; but it is a long way from two or three acres to 150 acres.

Conceding that the defendants really did tell plaintiff that the land at that end of the tract "went to the river," and assuming that plaintiff supposed, as she actually did suppose, that the river ran close along the

other side of the levee, does that in any respect lessen the defendants' moral and legal obligation to make good to the plaintiff, after agreeing to give her a tract of protected alfalfa land for \$125 an acre, and taking from the plaintiff 600 times \$125 upon her belief in their own representations that there were 600 acres of protected land to the tract? That defendants' agents assured plaintiff that she was going to have 600 acres of protected land, and that the plaintiff "implicitly" believed those representations and assurances is nowhere denied. Counsel now rests on the contention that, assuming those facts to be true, nevertheless from certain things that were said to her she should have inferred, or reasoned, that those assurances were false and fraudulent and not to be relied upon, and that because she failed to so reason, and failed to so infer, she has no comeback. Is counsel's contention logical? Is it just? Logically, is he not in pretty much the same position as the man who tries to lift himself over the fence by his boot straps?

Thus far we have assumed it to be true that the defendants, when they mentioned the western boundary to the plaintiff, used the word "river," instead of the word "levee." On page 263 the witness Dike testifies: "We did point out the boundaries, and mentioned certain fences which constituted the southeast and north boundaries and the river bank represented the west boundary." That by the "river bank" he meant the levee is clear when we read his testimony on page 261, where he says "*levee and river boundary.*"

Counsel has devoted a large portion of the first twenty pages of his brief to a very laborious argument attempting to prove that the plaintiff's own testimony shows that defendants told her that the land went over the trees on the far side of the levee. That he is mistaken will be perfectly clear to the court if the court will read the testimony of the plaintiff commencing with the first question on page 206 and continuing to the bottom of page 207. The trees tops on the far side of the levee formed a dense bank or line of green, and her testimony is to the effect that they told her that the western boundary line ran *along* that green line, not across it or on the far side of it. At a previous point in her testimony when she says "*across those trees*" she is referring to trees at the other end of the tract. She never referred to the levee as trees, but she speaks of it as a green line; and her testimony is that they said "*along* that green line."

In the lower half of page 9 of the typewritten opinion the court has inadvertently misstated the facts. The opinion reads: "She was told by one of the Scheibers at least that a portion of the land lay over beyond the levee, and was asked to go upon the levee and see for herself." Nowhere in the record do any of the Scheibers testify that they told her, or said to her, that "a portion of the land lay over beyond the levee." This is clear by the testimony of Morris Scheiber, on page 359 of the record, where he says:

"Q. Did you tell her any land went across the river?

"A. No, not across the river, I says, 'Over to the old Feather River.'

"Q. Do you know whether she understood at the time or not that the river was up against the levee or whether it was away back from the levee?

"A. I don't know.

"Q. You don't know?

"A. No; she did not say anything."

Whatever reference was made to any land outside the levee it was never even hinted to the vendee that it was a part of the 600 acres of protected land that she was to get.

Now, as to her being invited to go upon the levee. That invitation was not extended to her by any of the Scheibers. Dike was the one that mentioned going upon the levee. On page 262 of the record the witness Dike states that he asked Miss Garwood if she would like to climb up the levee; but he made no reference to any land outside the levee as being any part of the 600 acres of protected land which she was to receive, or in fact as any part of the ranch.

By the numerous cases cited in plaintiff's brief under the heading on page 115 the defendants are liable for each and every act and representation of the agents. The principal cases that I now call to mind, quoted from at length in the portion of plaintiff's brief, are the following:

Connecticut Mutual Life Ins. Co. vs. Carson,
(Mo., 1915) 172 S. W. 69;
Althorf vs. Wolf, 22 N. Y. 365;
Busch vs. Wilcox, 82 Mich. 336, 21 Am. St.
Rep. 563;
Bank of Calif. vs. Western Union Tel. Co., 52
Cal. 291.

A glance at these cases will show that the defendants, when they adopted the contract and took the purchaser brought to them by the three agents, should have questioned the vendee in regard to what representations had been made by the agents. In order to avoid liability, they should have advised plaintiff fully in regard to the actual conditions of the land. It is nowhere contended that defendants did not fully know just what the true conditions were. They make the claim that they never had the land surveyed; but it must be remembered that they farmed the tract as yearly tenants for many years before they signed the contract to buy, and they certainly knew every inch of the ground before they bought. If they never had it surveyed themselves, it was because it was unnecessary to have it surveyed. The Pacific Mutual Life Insurance Company, from whom they bought it no doubt had it surveyed while they were tenants, and gave them a guaranteed statement of the acreage. The defendants themselves knew at the time that there were just 450 acres of protected land. There can be no possible doubt of this when we consider the testimony. At the foot of page 363 defendant Morris Scheiber testifies: "Q. When you bought that land of the Pacific Mutual, you paid \$26,000 for it? A. We paid \$27,000." Now, if we divide \$27,000 by 450 we will find that 450 goes into \$27,000 just 60 times. What does that signify? It means that they bought the land as 450 acres, and that they paid just \$60 an acre for those 450 acres.

Now, having that knowledge of the land they knew

that the plaintiff was going away with a misapprehension that she was getting 600 acres of good protected land. Had they been on the square they would have told the plaintiff frankly and honestly just what the conditions were, and they would have said to her: "You must not go away with the impression, Miss Garwood, that you will have 600 acres of protected land; the old description calls for 600 acres, but there are only 450 acres." "One hundred and fifty acres are outside the levee, and it cannot be farmed because it is subject to overflow, and is nothing but swamp and sand." Did they do this? What do they say they told her? They claim that they told her that the deed calls for 600 acres more or less, and that they sold it as they bought it. They claim that they always told her "600 acres more or less"; and they keep repeating the words "more or less" with a monotonous and mechanical repetition which strongly inclines us to believe that they never heard the words "more or less" until after this action was commenced. Miss Garwood denies that they ever used the words more or less; but we are not arguing that point. The point we make is that 600 acres, more or less, means approximately 600 acres and not 450 acres; and that when they knew that she was laboring under the belief, superinduced by the representations of their own agents, that there were 600 acres of land, they should have then and there set her right on that point.

A substantial point of argument is this: By the uncontradicted testimony of four witnesses (see quotations of testimony on page 8 of this petition) it is con-

clusively and irrevocably established that the land was sold to the vendee at the agreed price of \$125 per acre. The vendors took from the vendee 600 times \$125, to-wit, \$75,000, and that circumstance in itself will permit of no conclusion other than that that sum of money was paid to the vendors by the vendee upon the mutual agreement that there were 600 acres to the tract. Under circumstances such as these, does not the law clothe the transaction with an implied *assumpsit* upon the part of the vendors to refund to the vendee \$125 for each acre that the land falls short of the number of acres paid for?

Reduced to its lowest terms the whole proposition is simply this: By the terms of the agreement the plaintiff was to receive 600 acres of level land protected from overflow by levee. The vendee obtained that understanding from the vendors' agents, and the vendors themselves well knew that she had that understanding at the time of the sale; and while having that knowledge, the vendors failed to do a single one of the things which they should have done to disabuse her mind of the false impression which they knew she was laboring under. Under these circumstances the plaintiff is entitled to the 600 acres of protected first-class alfalfa land, which the agreement called for, or its equivalent, regardless of what land lay on the outside of the levee.

By the cases which we have just cited the words of the agents are put into the mouths of the principals, and the law will not now allow the defendants to say: "You have foolishly placed too much reliance upon

the statements which we ourselves have made to you." The legal and technical liability of the defendants is complete, and their moral duty to return to the plaintiff the money which they took from her without giving her anything in return therefor is identically as great.

THE POINT OF LAW INVOLVED.

The point of law involved is as to the admission of testimony. The court below allowed the defendants to put in opinion testimony to the effect that the 450 acres of land actually conveyed were worth \$75,000. The court even allowed a witness for the defendants to testify that he had offered Miss Garwood what she had paid for the ranch. Miss Garwood most vehemently denies that Silva ever made any such offer. The error as to the admission of the testimony as to the offer by Silva is argued under Exception No. 3, on page 33, of the plaintiff's brief, and we can add nothing to what has been there said.

If the defendants represented to plaintiff that the land consisted of 600 acres of first-class alfalfa land, protected by levee, and the understanding was that she was to have the land at the price of \$125 an acre, and the plaintiff, in full belief in the representations, paid to the defendants \$75,000, will the defendants, as a defense, be permitted to put in opinion testimony to the effect that the 450 acres which the plaintiff actually received are worth more than \$125 an acre? Would it be good law to allow such testimony? The decision of this court, as the opinion now stands is

authority to the effect that such testimony is proper. In plaintiff's brief under the heading "Argument on the Errors of Law," on page 19, will be found many cases holding that such evidence is no defense whatever. I have looked through the books as carefully as I can, and have run the point down to the last month, and I have not found a single case expressing a doctrine contrary to that of the cases hereinafter cited. And the court will look in vain through defendant's brief for such a case. The defendants simply say that "plaintiff's damage is the difference between the value of that which she parted with and that which she received." There can be no argument on that point. That is settled by the two cases of *Smith vs. Bolles*, 132 U. S. 125, 33 L. ed. 279, and *Sigafus vs. Porter*, 179 U. S. 116, 44 L. ed. 113. The only point of difference between us is as to the method by which we are to ascertain the value of that which plaintiff received. Defendants contend that the contract of the parties should be disregarded, and a new and appraised value put on the land by opinion witnesses. My contention is that the contract of the parties affords the only means of fixing the value of that which the plaintiff received. The complaint in this case is framed upon a certain and well defined theory. The theory is that, by the agreement of the parties, the defendants were to sell to the plaintiff a certain number of acres of a certain character of land, at a certain specified price per acre, to-wit, 600 acres of level river-bottom land, protected from overflow, at \$125 per acre. Plaintiff received under the contract

only 450 acres and she has brought action on the contract to recover for the deficiency. The theory of damage asked for by the complaint is that plaintiff is entitled to the difference between the value of that which she parted with and that which she actually received. That is the correct measure of damage according to the two famous cases of *Smith vs. Bolles* and *Sigafus vs. Porter*. The value of that which plaintiff parted with it \$75,000. What is the value of that which she received? By all the cases, as well as by logic, the value of the land which the plaintiff received can be nothing other than the contract price per acre multiplied by the exact number of acres which she received. She received but 450 acres of land. Conceding the 450 acres to be as represented, it is worth, according to the terms of the contract, $450 \times \$125$, which is just \$56,250. \$56,250, then, is the value of that which the plaintiff received under the transaction, and when we subtract \$56,250 from \$75,000 we get \$18,750, which is plaintiff's damage by reason of the shortage at the upper end of the tract. By that measure of damage she is simply given compensation, nothing more. It simply reimburses the plaintiff at the agreed price per acre for the number of acres missing or worthless. Does that measure of damage work substantial justice? We can conceive of no argument to the contrary. A review of the law as to the measure of damages in cases of this kind will show that there are two different lines of doctrine. Many of the states have held to the rule that the measure of the plaintiff's damage in cases of this kind is the difference between

the appraised value of the property as it actually is and the value that it would have were it as it was represented to be. This measure of damages gives the vendee damages for the loss of his bargain. To illustrate: Suppose that as in this case, the agreement between the vendor and the vendee was to the effect that the vendor was to sell to the vendee 600 acres of a certain character of land at a certain price per acre, and it turned out that the tract was just 150 acres short of the 600 acres agreed upon. Were the complaint framed under the theory of law which allows damages for the loss of the bargain, it would allege the market value of the land considering its actual condition and also the market value it would have were it as it was represented to be. Thus, supposing that the complaint should allege that the market value of that character of land was \$1000 an acre, and there were 150 acres missing, the damage would be just \$150,000, no matter what price was paid for the land. If it were bought at the agreed price of \$125 per acre, then just \$75,000 was paid for it. And thus we see that the vendee's damage would be \$150,000, notwithstanding the fact that he had parted with but \$75,000, and notwithstanding the fact that he had admittedly already received \$450,000 worth of land in the transaction. The two famous cases *Smith vs. Bolles*, 132 U. S. 125, 33 L. ed. 279, and *Sigafus vs. Porter*, 179 U. S. 116, 44 L. ed. 113, have discarded that measure of damages so far as the federal practice is concerned, and they lay down the rule that all speculative profits are to be eliminated, and the damage obtained by

deducting the value of the property as it actually is from the amount which the purchaser parted with. We believe that the doctrine of *Smith vs. Bolles* and *Sigafus vs. Porter* is sound, and in this action the recovery is sought upon that theory, and the complaint was drawn and the proofs adduced upon that theory. The case of *Howes vs. Axtell*, 74 Iowa, 400, 37 N. W. 974, lays down the rule that in a suit for damages for shortage of land, the value of the land is to be obtained by multiplying the contract price per acre by the actual number of acres received. *Howes v. Axtell* is cited with approval by the United States Supreme Court in the case of *Sigafus vs. Porter*, 179 U. S. 123. Assume that a party bought what was represented to him to be 600 acres of a certain character of land at \$125 an acre, and the tract turned out to be 150 acres short. The vendee brings an action against the vendor and his action seeks to recover damages for the loss of his bargain. The complaint alleges that land of the character of that agreed upon is worth \$1000 per acre, and, as the tract is 150 acres short of the acreage agreed upon, he alleges his damage to be \$150,000, notwithstanding the fact that he has parted with but \$75,000, and notwithstanding the fact that he has confessedly already actually received \$450,000 worth of land. The court, in passing on the case, and applying the doctrine of *Howes vs. Axtell* and *Smith vs. Bolles* and *Sigafus vs. Porter*, would say to the plaintiff: "You cannot now be heard to say that that land is worth \$1000 an acre, because when you made the purchase you did so upon the agreed valuation of \$125

per acre. You are bound by your agreement." And by the same reasoning the court will make the same reply to vendors who would avoid liability for shortage by asserting that the acres actually conveyed are worth more than the price per acre agreed upon. *Howes vs. Axtell* says: "The law will not permit either party to dispute the value as settled by them." (74 Iowa, 400, 37 N. W. 974.) On page 11 of the typewritten copy, speaking of the admissibility of this testimony, the opinion reads: "If the sale were in gross—and this is what the defendants maintained—it was pertinent to substantiate its gross value." The fact must not be overlooked that if the sale were in gross the plaintiff would have no ground for recovery in any event, no matter what the value of the land—whether great or small. If the sale were found to be in gross, it would be so found because of a failure to prove some of the essential representations complained of. On the other hand, if the alleged representations are true, the sale cannot possibly be in gross. If any of the essential allegations in respect to the representations are not true, defendants are under no necessity of establishing value for the market value or appraised value is immaterial. Then again, if it is true that these representations were made, the market value or appraised value of the portions of land uncomplained of is immaterial, for the same reason, viz., the value has been already fixed by the agreement of the parties. The only questions for the trial court to examine are these: "Is it true that the land was represented to be 600 acres of level river bottom

land protected from overflow by levee? Is it true that the price and value as settled by the parties was \$125 per acre? Is it true that plaintiff paid to defendants 600 times \$125, or \$75,000, with the understanding that there were 600 acres? Is it true that the land is deficient in the respects alleged? Should those questions be not all answered in the affirmative, the plaintiff cannot recover, no matter what the appraised value of the land. But if they are answered in the affirmative plaintiff is entitled to redress no matter what anyone might opine the land to be worth. The law will not force the purchaser to be satisfied with a fraction of the article purchased and paid for merely because the court is of the opinion that the whole would really be worth more than the contract price.

We thus see that in the case at bar the questions at issue are purely those as to the representations, and that under no theory of the case is opinion evidence of the market value of the land uncomplained of material. The mischief which would result from such a rule of law as is here complained of will be at once apparent. Just as in the case at bar, all the elements of the case might be established, and the plaintiff be entitled to recover, yet, from the testimony of experts, the court might conceive the idea that the land as it actually is, is really worth, by reasonable market value, all that the vendee parted with in the transaction, and, as a result, the vendee would be deprived of his right to have what he bought and paid for. The court would be making a new contract for him.

In *Harrell vs. Hill* the court says:

“Evidence was introduced and the fact conclusively established, that the tract of land in question, though less than one hundred and eighty acres, was and still is worth from twenty-five to thirty dollars per acre, and it is insisted by the counsel for appellee that it would be inequitable and unjust to permit the appellant to retain the quantity really existing and allow here compensation for the deficiency in proportion of the gross price agreed to be paid for the supposed quantity—one hundred and eighty acres. In response to this, we have to say that we can alone look to the agreement of the parties to determine the value of the premises in question. By their contract, solemnly entered into, they have computed the tract supposed to contain one hundred and eighty acres at the gross price of one thousand five hundred dollars, or at the average value of eight dollars and thirty-three and one-third cents per acre. The evidence of other persons as to their estimate of the value of the land must be regarded as foreign to the subject and not pertinent to the inquiry, the true rule in analogous cases being that the price paid must be regarded as the only evidence of the value.”

Harrell vs. Hill, 19 Ark. 102, 68 Am. Dec. 212.

In the case of *Howes vs. Axtell* the court says:

“The twelfth instruction directs the jury that the price agreed upon is to be taken as the value of the 84 acres of land. This is correct. When parties by solemn agreement, fix a value to property, they are bound by it. The law will not, in a case of this kind, permit either party to dispute the value as settled by them. The instruction directs that the value of the land as it is found, *considering its real quantity*, is to be deducted from the value as settled by the agreement of the

parties, and the difference will be plaintiff's damages. This rule is just, *as it gives plaintiff compensation*, and nothing more. See *Hallam v. Todhunter*, 24 Iowa, 167." (All Italics ours.)

Howes vs. Axtell, 74 Iowa, 400 (1888), 37 N. W. 974.

The United States Circuit Court of Appeals for the fourth circuit, in the case of *Kell vs. Trenchard*, says:

"The agreement to pay \$60,000 was a single and entire undertaking for the whole property purchased; and appellant should not now be heard to say that, although there may have been fraud as charged by the appellees in the sale of the timber, the entire property was worth more than he sold the same for. This action involves solely the question of whether the appellees, by reason of the fraud practiced by the appellant and his agents, are entitled to relief because of the disparity in the quality of the timber sold. They made no complaint as to the other property; but aver that as to the timber purchased there was a warranty that there would be at least 35,000,000 feet, and that the purchase of the timber was the moving consideration that caused them to acquire the property of the appellant, it being their purpose to go extensively into the lumber business; that the appellant and his agent, Vaughn, procured the contract from them by false representation as to the quantity of timber bought; and that they in consequence received 8,232,100 feet, instead of 35,000,000 purchased by them."

Kell vs. Trenchard, 142 Fed. 20, 73 C. C. A. 202.

The case of *Kell vs. Trenchard* arose in North Carolina. It was decided by the United States Cir-

cuit Court of Appeals for the Fourth Circuit in 1905. The opinion quotes with approval the cases of *Smith vs. Bolles* and *Sigafus vs. Potter* to the point that the measure of damages in such cases excludes all speculative losses. The opinion states that the measure of damages in such cases is the difference in the value between that which the purchaser parted with and that which he actually received. That is our position exactly; and *the actual value of that which the plaintiff in this case received is the contract price per acre multiplied by the exact number of acres received*. Were it good law to disregard the terms of the contract, and take a new and appraised value of the portion of the property uncomplained of, it would certainly have been permitted in *Kell vs. Trenchard*.

By *Kell vs. Trenchard* alone it is clear that under no circumstances, nor for any purpose, is that testimony admissible. And yet the opinion in this case holds that it *is* admissible. And the opinion says that by that testimony it is shown the the 450 acres of usable land which the plaintiff actually received is worth the \$75,000 which she parted with, and that she is therefore not entitled to relief. The highly prejudicial character of the testimony is obvious.

Land values are awfully uncertain quantities, and it would be a strange and most singular rule of law which would permit a party to solemnly contract in reference to the value of land, and thereafter go into court and request the court to ignore that agreement in order to relieve him from liability for false statements in reference to the quantity of the land.

The error which the record discloses is of the most serious and prejudicial character. Other than the testimony complained of, there is no evidence in the record to support the judgment for the defendants. The evidence shows the facts to be that the contract price per acre was \$125, and that the defendants took from the plaintiff 600 times \$125 with the understanding that there were 600 acres to the tract. By uncontradicted testimony it is shown that the land was represented to be free from overflow. It is admitted that there are only 450 acres to the tract, and that whatever land there is above that amount is subject to overflow to such an extent that it is valueless. We now respectfully ask: "Have we not established the elements of a case?" If these are the facts, why is not this plaintiff entitled to relief? She was not a person of great wealth to begin with, and the transaction has all but ruined her financially, and has changed the whole course of her life.

As I stated at the outset, I believe that the court has labored under the belief that the plaintiff has already received full value for her money, and that by this action she is unconscionably trying to relieve the defendants of money to which she is not righteously entitled. Impressions once formed are often hard to remove. I believe that I should at this time use every honest means within my power to disabuse the court's mind of that impression; and in this regard I will say that during the course of the trial, in the court below, after the defendants had made the boast that the land, as it was, was worth \$75,000, the plaintiff filed with

the clerk of the court below a stipulation and agreement in writing to the effect that, in the event of judgment for the plaintiff, the defendants could, in lieu of paying the judgment, take back the land, and return plaintiff her money, together with what she had been compelled to pay out for reclamation improvements. This offer is now on file in the court below, and the document bears the clerk's red ink number 53. It was filed Sept. 11th, 1915, while the cause was under submission, and is entitled "Stipulation as to Delivery of Deed." The question is now pertinent: "Would the plaintiff prosecute this expensive litigation, in the presence of a standing offer of that character, if she could get back the money expended by selling the property?"

The ends of justice can not be defeated by a reargument of the important questions here discussed. A reargument may rather prevent a miscarriage of justice.

Respectfully submitted,

LLOYD MACOMBER,
Attorney for Plaintiff in Error and Petitioner.

I hereby certify that in my judgment the foregoing petition is well founded, and that it is not interposed for delay.

LLOYD MACOMBER,
Attorney for Plaintiff in Error and Petitioner.

L.M.